IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE CASE NO: 332/2019

In the matter between:

CEBSILE SIMANGELE KUNENE Applicant

AND

SCENIC INVESTMENTS (PTY) LTD Respondent

T/A BARRATT BOARD & TIMBER

Neutral citation: Cebsile Simangele Kunene v Scenic Investments (Pty) Ltd t/a Barratt Board & Timber 332/2019 [2023] SZIC 32 (17 April, 2023)

Coram: **L.L. HLOPHE–JUDGE**
(Sitting with Mr. M.P. Dlamini and Mr. EL.B. Dlamini – Nominated Members of the Court)

HEARD: **13 October 2022**

DELIVERED: **17 April 2023**

SUMMARY: Labour Law- Applicant claiming unfair dismissal-following dismissal without a hearing-undue delay in preferring charges against employee- Letter of dismissal issued before initiated disciplinary proceedings could be concluded-employer alleging that the disciplinary proceedings could not be concluded because the employee made it difficult to complete the disciplinary hearing as she allegedly intimidated and threatened witnesses- Whether such dismissal was substantively and procedurally fair.

HELD: The dismissal of Applicant was substantively fair but procedurally unfair.

JUDGMENT

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[1] These proceedings consists of an application brought by the Applicant, Cebsile Simangele Kunene, claiming to have been unfairly dismissed from her employment by the Respondent, mentioned herein above.

[2] When instituting these proceedings the Applicant claimed to have been dismissed unfairly by the Respondent on the 10 th day of September 2019.She had been in his employment for four years: she having been employed in May 2015.These contentions of the Applicant turned out to be common cause as they were not denied by the Respondent.

[3] It was also not disputed that after her said dismissal the Applicant reported a dispute with the Conciliation Mediation and Arbitration Commission

("CMAC") for it to be conciliated upon. The said conciliation did not bring with it a resolution of the reported dispute. It resulted in a certificate of an unresolved dispute being issued. This certificate is one of the documents attached to the application.

[4] It came out during the Applicant's testimony that prior to her dismissal, she was charged with five counts:

4.1 These consisted of count 1, in which it was contended that she had embarked in unbecoming behavior towards the Respondent's Managing Director, in September 2018. In the said count she was alleged to have engaged in an altercation or exchange with the said Managing Director who is said to have been warning her about being rude to the other employees.

4.2 In the second count, the contention was that the Applicant had exhibited violent behavior towards her colleagues in November 2018. It being alleged that she shouted and threatened them in front of customers thus tarnishing the image of the company and that such conduct had a negative impact on the Respondent's customer base.

4.3 On Charge three (3) the Applicant faced a dereliction of duty charge. It being alleged that on or about the 25th May 2019 she left or abandoned her work station and disappeared for 2 hours, without authorisation from management. Again on the 28th May 2019 she again left her duty station without authorisation.

4.5 On count 4 she faces a charge of insolence. It was contended that she had, on the occasion of her abandoning her post refused to explain her disappearance to the Managing Director. This was notwithstanding the latter's having asked her to explain her said conduct. She in fact allegedly ignored her employer's instruction to explain the same.

4.6 Count 5 was an allegation that she had committed an act of misrepresentation by submitting a sick sheet with the name of one Cebsile Matsenjwa as that of hers, well knowing that such was not the case. Such conduct it was contended amounted to fraud.

[5] It is unclear if a disciplinary hearing was ever held after the commission of the alleged offences, except that it is not in dispute that on the issues pertaining to the third and fourth counts, the Applicant was issued with a final written warning. The final written warning referred to the Applicants abandonment of her duty station without authority on the 25th May 2019 and the 28th May 2019, as well as her failure to explain her whereabouts to Management on these occasions.

[6] Testifying before court the Applicant stated, that over and above what has already been captured above that, she was employed as a Sales and Stock Controller. She earned a sum of E7371.00 per month. On the 8th July 2019 she said she was served with what were referred to as charges. We say referred to as charges because it did transpire that there was no disciplinary

code, which spelt out the offences obtainable at the undertaking including how they were to be sanctioned. We can only say *en passe* that such state of affairs is not advisable in a modern undertaking given that it creates a lot of uncertainties with the employer possibly being the recipient of the adverse conclusions as it may be difficult for it to convince the court that a particular type of conduct was known to an employee as an offence before she was charged or even worse still that a particular sanction the employer metes out on an employee found guilty of misconduct was indeed dismissible. We say this being alive to the fact that the Applicant's contract of employment does state certain offences, particularly those covered under **Section 36 of the Employment Act of 1980 (as amended)**, but we note that they are not detailed enough as would be the case in a disciplinary code.

[7] Otherwise the Applicant confirmed that she was abruptly suspended from work slapped with 5 charges and subjected to a disciplinary inquiry to prove her guilt or otherwise. According to the Applicant, she had applied in writing to the Chairman of the disciplinary inquiry for leave to be represented by a legally trained person allegedly due to the fact that none of her workers had agreed to represent her. She had still not received the opposing papers although the cutoff date for their filing had passed, when she was served with a letter terminating her services. The reasons put forth were that she had intimidated witnesses and made it impossible for her disciplinary inquiry to be continued with and concluded. She denied the said assertion particularly because no evidence establishing same had been led.

[8] She contended, in these circumstances, that her dismissal was not for any offence proved to be dismissible and that taking into account all the circumstances of the matter it was not fair to dismiss her particularly that there had not been led evidence establishing her guilt prior to her dismissal.

[9] The respondent led three witnesses in its defence of the proceedings against it. These were Rw1 Mzwandile Ngubane, Rw2 Nomfundo Barratt and Rw3 Nana Shabangu.

[10] What transpired in the Respondent's case is that some key witnesses were called thus weakening its case. It made it worse that the said Respondent's case confirmed what had been testified to by the Applicant; namely that at the disciplinary hearing, the enquiry into the Applicant's guilt or otherwise had not been completed. In other words, the dismissal of the Applicant was not based on a proven dismissible case, because it had taken a break, which was followed by a letter terminating her services. It is not in dispute that although it was claimed in terms of the said letter that the Applicant had threatened and/or intimidated Witnesses and thus made it impossible for them to testify, no charges had been preferred against her.

[11] It is a fact therefore that whatever attempt at proving a dismissible offence against the Applicant only happened before this Court. There is no doubt that the Respondent only did this because of the position of our Law which is to the effect that the Industrial Court does not sit as a review Court to determine whether all procedures and rules were followed before the disciplinary

hearing but that it sits as a Court in which the guilt or otherwise of the employee must be established. See in this regard ***Swaziland United Bakeries vs Armstrong Dlamini ICA No. 117/94.***

[12] We can only comment in passing that what happened in that case is distinguishable from the present matter and it could be pushing the principle therein enunciated too far to think that an employer would be entitled to hold no Disciplinary Hearing or to hold a visibly lopsided one under the belief that he would have to lead full or proper evidence at the Hearing before the Industrial Court.

[13] We say this being alive to the fact that at the heart of the proceedings before the Industrial Court, is the question whether the dismissal which would have already occurred at that stage complied with the procedural and substantive requirements of a dismissal.

[14] The case of ***Sipho Mndzebele v Twin Engineering (Pty) Ltd Case No. 550/07*** ,cited by the applicant's counsel, confirmed this principle if not expressly then impliedly. Nkonyane J (as then he was). said the following, which in our view underscores the significance of a disciplinary inquiry before a dismissal; *"However much the employer may believe that the employee has committed a misconduct, the employee is still entitled to fair disciplinary hearing. There are two components of fairness, that is, procedural and substantive fairness"* (see: ***Tubecon (Pty) Ltd V NUMSA (1991) 12 ILJ 441).***

[15] In a case like the present where the disciplinary inquiry that was held was only for a short while and was abandoned before it could even be concluded, it does seem to us that there is no way one can avoid an adverse conclusion against the Respondent that the dismissal was procedurally unfair. We therefore have to proceed from that premise to consider the other aspect of the dismissal; that is the substantive fairness of it.

[16] In an attempt to prove or establish the substantive fairness requirement of the dismissal, the Respondent, during its case among the three witness referred to above, led Rw1 Mzwandile Ngubane who testified that in November 2018, he, whilst in the company of someone else were ill-treated by the Applicant at the respondent's shop. They were there to try and exchange some goods they had purchased earlier, which had erroneously not fitted the description of those they really needed. He alleged that the Applicant ill-treated them by engaging in an altercation claiming they had not purchased the said goods from there despite the fact that they had with them a receipt from that shop describing them. According to Rw1 the Managing Director of the Respondent, Mr Ian Barratt had to intervene. Applicant had at some point threatened to use a bush knife against them.

[17] Rw2, Mrs Nomfundo Barratt told the Court that she had been informed at her salon that the Applicant had threatened violence against her, using some vulgar descriptions of her. It however turned out that this particular witness who was a co-director of the Respondent's company with Mr. Barratt, had not

had first hand information about these alleged threats. She had only been told those were being made by the Applicant. Whatever strong feelings this witness and the Respondent may have had against the Applicant, it could not be used to justify a finding of guilt against the Applicant. It could be that she was known to have a rude disposition towards the leaders of the Respondent's company or even in general, but as things stand that assertion amounted to hearsay evidence; which is no evidence in Law. Consequently, no threats of violence can be said to have been found in these circumstances.

[18] The second aspect of Rw2's testimony trying to prove the dismissible case against the Applicant was that she had received a letter through Mr. Barratt, said to have been written to the company management complaining about the Applicant's conduct. The letter was from one Sakhile Hlandze who whilst she was still an employee when she wrote the letter. She had since resigned after the Applicant had left her job due to the dismissal she had been subjected to. In that letter Sakhile Hlandze had contended she was being bullied, ill-treated, and threatened with violence by the Applicant who at one point had threatened to hack her with a bush knife.

[19] The problem with this testimony is that Rw2 was not there when those acts of ill-treatment or threats of violence allegedly occurred. Sakhile Hlandze was herself not called to confirm such information. In that sense the contents of the letter testified to by the said Rw2 or anyone else other than their author, was hearsay, particularly because that person trying to advance them, had not heard them of her own from the Applicant. We have already indicated that

hearsay is no evidence. Consequently, the testimony of Rw2 took the matter nowhere except to confirm the suspicion that the Applicant might have been an uncouth character. It is unfortunate that the Court cannot rely on suspicion no matter how strong that suspicion is.

[20] The closest Rw2, Nomfundo Barratt comes to proving the case against the applicant is that she is aware of the incident that allegedly led to these acts being made against Sakhile Hlanze by the applicant. She, Rw2, had gone to the employee's work place to address them on allegations she had received that the managing director's children were not welcome at the Respondents undertaking attributed to the applicant and other employees. Although the applicant had allegedly shown an understanding during the address, it was to later transpire that she had gone out of her way to accuse the said Sakhile Hlanze of being a spy, who was unpaid (*liposi lelingabhadalwa*) when she reported events or issues like that to Rw2. She allegedly threatened to use a bush knife against such a person. Nana Shabangu confirmed having heard this altercation.

[21] Worthy of note is that most of these instances forming the bases of the disciplinary charges against the applicant had occurred some eight or nine months before the charges. Whatever the justification for such delay does not augur for an employer to keep such an incident in abeyance only to spring to action after an unreasonably long period. Perhaps this time around she had been angered by the employee in question. For charges to make sense they have to be acted upon timeously. The employer runs the risk of being taken to

be abusing the process or to be using it for ulterior purposes if she has to delay unreasonably and only spring to action later. Owing to the view we have taken in the matter and the fact that it makes no difference or in the circumstances on whether or not the charges were time barred or not we will not decide this question, except to caution a party in the respondent's situation herein to ensure that if it acts, it should be objective and leave no possibility for other influences pointing to an ulterior purpose.

[22] The third witness for the respondent was Nana Shabangu. She testified how she witnessed the applicant engaging in a heated altercation with Mzandile Ngubane and Mr. Gama although she did not hear what was being said, she confirmed that the applicant was the aggressor. Asked what she meant by aggressor, she said she meant the person who raised her voice and acted like she was about to man handle the person she was arguing with.

[23] This suggests to me that although she could not hear what she was saying to Ngubane and Gama she does confirm what Ngubane said about being ill-treated by the applicant.

[24] Nana Shabangu further testified how she had on a certain day in 2018 witnessed an incident wherein as employees of the Respondent's company they were addressed by Mrs Barratt. She had heard that her and Mr Barratt's children were not welcome at the undertaking by the employees and had felt the need to address them. After the said address, she testified that she saw and heard the applicant attack one Sakhile Hlanze whom she referred to as a snitch

who deserved to be chopped with a bush knife. She described her as an unpaid post (*liposi lelingabhadalwa).*

[25] Rw3, Nana further heard the applicant refer to Mrs Barratt as a bitch, which she did in full view of other employees.

[26] As indicated above, a dismissal of an employee should be fair both procedurally and substantively, we have already said why we have come to the conclusion why the dismissal was procedurally unfair and we cannot change it now. On when a dismissal is fair substantively it must be for a fair reason as envisaged by **Section 36 of the Employment Act 1980 (as amended)** and the Disciplinary Code (where one is in place) and taking into account all the circumstances of the matter it should be fair and reasonable. The question is did the Respondent meet this requirement. There can be no doubt that the applicant did ill-treat Mzwandile Ngubane, Sakhile Hlandze and Nana Shabangu (Rw2). **Section 36 of the Employment Act 1980 (as amended),** prescribe that it shall be fair for an employer to terminate the services of an employee, who ill-treats, intimidates or uses violence against other employees or customers.

[28] We cannot say it is a light matter for an employee to ill-treat or threaten violence on other employees and members of her employer's family and customers. There is ample evidence pointing to an ill treatment of Mr. Mzwandile Ngubane by the Applicant; ill treatment of Rw2, Mrs Nomfundo Barratt and Sakhile Hlanze. When one accepts the testimony that Mr Ngubane

was ill-treated just as was the case with Mrs Barratt and lastly Sakhile Hlanze one would be asking for too much if he were not to accept the ill treatment of such characters by the applicant including going further to thoroughly humiliate the Managing Director's wife, Rw3, when she referred to her as a bitch. It also cannot in our view be denied that it was fair and reasonable to dismiss a person in the position of the applicant who humiliated her seniors, who are members of the Respondent's Company which used to pay her salary.

[29] Consequently we are of the considered view that an award in the manner such as herein below befits the circumstances of this matter. Accordingly we order the Respondent pays the Applicant Cebsile Simangele Kunene a former employee of the Respondent the following:-

(a) Notice pay at E7, 371.00.

(b) Additional notice pay at E4, 020.48 (4 days x 3 years x E335.04)

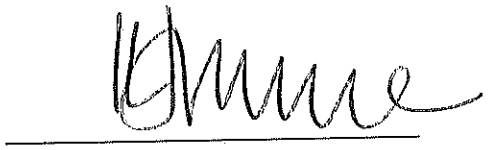
(c) Severance allowance E10, 051.20 (10 days x 3 years x E335.04)

(d) Compensation (3 months' salary) E22, 113.00

Total **E43, 555.68**

[31] We make no order as to costs.

The members agree.



L. L. HLOPHE

JUDGE- INDUSTRIAL COURT

FOR APPLICANT: Mr.M.Motsa
(Musa Motsa Attorneys)

FOR RESPONDENT: Mr. B. Gamedze
(M. M. Sibandze's Attorneys)